

ORIGINAL

FILED

July 7 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 10-0156

STATE OF MONTANA,
Plaintiff and Appellee,

Re- FILED

JUL 07 2010

v.

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

KAREN DANIEL-KNOLL,
Defendant and Appellant,

OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, the Honorable Kathy Seeley, Presiding

APPEARANCE:

KAREN DANIEL-KNOLL
Pro Se Litigant
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STEVE BULLOCK
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Helena, MT 59620-1401

LEWIS & CLARK
COUNTY ATTORNEY
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STATEMENT OF ISSUES:

The Defendant received ineffective Counsel depriving her of her U.S. Constitutional right to a fair trial. The Defendant does not meet statute as charged in MCA 45-6-316.

STATEMENT OF THE CASE:

An Information was filed charging the above-named Defendant with the offense of **Issuing a bad check (Common Scheme)**, a felony, in violation of Sections 45-6-316 and 45-2-101, alleged to have occurred on or between May 30, 2006 – June 14, 2006.

On August 3, 2006, a hearing was held before the Honorable Thomas C. Honzel for the purpose of entering a plea at which the Defendant was present with her attorney, Jeremy Gersovitz, and the State was represented by Leo Gallagher, County Attorney for Lewis and Clark County. The Defendant advised the Court that she was prepared to enter a guilty plea to the offense charged. The Court determined from the Defendant and her attorney that the Defendant was entering her plea knowingly and voluntarily and that she was aware of her constitutional and statutory rights that she would waive by entering a plea of guilty. The Court determined that there was a factual basis to believe that the Defendant had committed the offense charged and

accepted the Defendant's guilty plea. On February 19, 2009 a sentencing hearing was held before Honorable Kathy Seeley at which the Defendant was present with her attorney, Bryan Norcross, and the State was represented by Leo Gallagher, County Attorney for Lewis and Clark County. The Defendant was sentenced to a period of ten (10) years, with seven (7) years suspended. The Defendant was given credit for 58 days credit for time served prior to sentencing. The Defendant was ordered to pay restitution in the amount of \$4,533.63. The Defendant was transported to the Montana Women's Prison on April 15, 2010. The Defendant is currently in the Passages Pre-release center in Billings, Montana.

STATEMENT OF THE STANDARD OF REVIEW:

1. The Defendant does not meet statute as written in MCA 45-6-316, specifically § (1) *Knowing that it will not be paid by the depository.* Valley Bank Branch Manager Kim Countryman provided an e-mail to the Prosecutor's office in which she stated she spoke with the Defendant and paid the checks.
2. According to MCA 45-6-316 (2) the Defendant was entitled to "5 *days after written notice of non-payment has been received*" to

make good the checks. The Defendant was never notified of the checks being returned by the Bank

3. The Defendant had an agreement or contract with the Bank to pay the checks as defined under MCA 30-4-401 and MCA 30-4-402.
4. The Defendant received ineffective Counsel. Jeremy Gersovitz and Bryan Norcross failed to bring the e-mail to the Court's attention. They further failed to investigate the agreement between the Defendant and the Bank.

ARGUMENT:

1. Did the Defendant receive ineffective assistance of Counsel? In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established a two-part test for establishing a claim of ineffective assistance of counsel. The United States Supreme Court established a criminal defendant's right to counsel rendering "reasonably effective assistance given the totality of the circumstances."

The Sixth Amendment right to Counsel exists, and is needed, in order to protect the fundamental right to a fair trial. A fair trial is one in which evidence subject to adversarial testing is presented to

an impartial tribunal for resolution of issues defined in advance of proceedings. Jeremy Gersovitz and Bryan Norcross failed to investigate the circumstances surrounding the Defendants charges. Defense Counsel never brought the Kim Countryman e-mail, the lack of notification of the non-payment status of the checks, or the statute deficits to the attention of the Court. Counsel has the duty to make reasonable investigations in order to make a reasonable decision in the application of defense.

Criminal defendants require Counsel's skill and knowledge in order to be able to successfully rebuff the State's attempt to imprison them. The direct result of their inaction is the Defendant's current status of incarceration.

The Defendant could not voluntarily waive rights to constitutional guarantees during sentencing concerning information she was not provided by her Counsel. The e-mail from Kim Countryman was exculpatory in nature and it was the duty of Counsel to bring it to the Defendant's attention, as well as to the Courts attention.

First, Counsel's performance was deficient, in that Mr. Gersovitz and Mr. Norcross' errors were so serious that Counsel was not

functioning as the Counsel guaranteed the Defendant by the Sixth Amendment of the U.S. Constitution.

Secondly, the deficient performance of Mr. Gersovitz and Mr. Norcross, was so serious as to deprive the defendant of a fair trial, they prejudiced the defendants ability to receive a fair trial.

2. Did the Court err by admitting charges against the Defendant?

The Defendant does not meet statute as written. The Bank agreed to pay the checks. Ms. Countryman notified the Prosecuting Attorney's office in an e-mail that she spoke with the Defendant and agreed to pay the checks. Under MCA 30-4-401. **When bank may charge customer's account.** (1) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable *if it is authorized by the customer and is in accordance with **any** agreement between the customer and the bank.* (emphasis added) And MCA 30-4-402. **Bank's liability to customer for wrongful dishonor -- time of determining insufficiency of account.** (1) Except as otherwise provided in this chapter, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, *but a bank may dishonor an item*

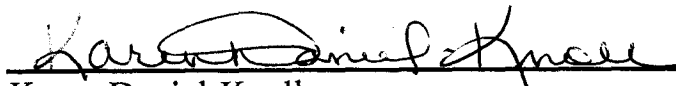
that would create an overdraft unless it has agreed to pay the overdraft.(emphasis added) Therefore, the Defendant does not meet statute as written and is further protected by two specified banking statutes.

Further MCA 45-6-316 is a two prong statute and the Defendant was never given the opportunity to fulfill the second part of the statute, as she never received written notification of the non-payment status of the checks.

CONCLUSION:

The Defendant requests the Issuing a bad check (Common Scheme) be dismissed with prejudice, as the Defendant does not meet statute. The Defendant request release forthwith from State custody and the restitution ordered in this case be dismissed.

Respectfully submitted this 29th day of June, 2010:

A handwritten signature in cursive script, appearing to read "Karen Daniel-Knoll", is written over a solid horizontal line.

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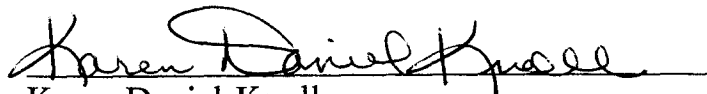
CERTIFICATION OF MAILING

I hereby certify that I caused a true and accurate copy of the foregoing
Opening Brief to be mailed to:

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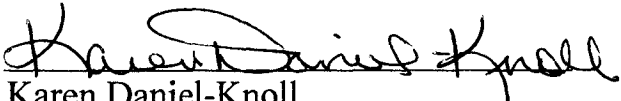
LEWIS & CLARK COUNTY ATTORNEY
228 Broadway
Helena, MT 59601

Dated this 29th day of June, 2010.


Karen Daniel-Knoll

CERTIFICATION OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words pre page, excluding Certificate of Service and Certificate of compliance.


Karen Daniel-Knoll